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Before the Arizona Corporation Commission

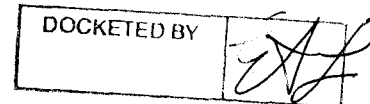
AZ CORP COMMISSION
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Arizona Corporation Commission

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SEP 19 2014



ORIGINAL

DOCKET NO. W-03514A-12-0007

**RESPONSE TO STAFF'S REQUEST
FOR PROCEDURAL CONFERENCE
AND HIS REQUEST TO MODIFY**

J Alan Smith
600 S. Oak St., Space 4
Payson, Arizona 85541
Telephone: (928) 951-2083

Bob Stump, Chairman
Gary Pierce, Commissioner
Brenda Burns, Commissioner
Susan Bitter Smith, Commissioner
Bob Burns, Commissioner

J. Alan Smith, Injured Party
Complainant,
vs.

PAYSON WATER CO. INC./BROOKE
UTILITIES INC.
Respondents.

NOW COMES, the Complainant J. Alan Smith, to respond to Staff's Request for Procedural Conference and to object to Mr. Pearson appearing merely by means of a telephonic appearance for and because:

1. Telephonic appearance does not allow the Complainant to properly examine the Witness;
2. A telephonic appearance will not allow the Complainant to submit to the Witness physical evidence for him to review, inspect and be questioned on;
3. A telephonic appearance does not comply with the subpoena to attend and produce copy of the documentation requested in the subpoena and which is in the Witness's possession and control and which he has maliciously refused repeatedly to supply as required.

In *United States v. Powell*, 379 U.S. 48 (U.S. 1964) the Court stated that; "a court has a duty to enforce an administrative subpoena if:

- The evidence is competent and relevant;
- The demand for information is definite;
- The purpose of the investigation is authorized by statute;

- 1 • Proper administrative steps are followed in issuing the subpoena.”

2
3 Vital and Necessary documents, records and materials have been required to be disclosed. The
4 Witness has repeatedly refused to produce them, lied about having them, and informed both the
5 Complainant and witness (Richard M. Burt, deceased) that he would not give the documents to them (the
6 entire conversation was recorded on a digital audio recorder). There is no excuse for the witness not to
7 produce the documents requested in the Subpoena served upon him. It is not the Complainant’s position
8 or authority to compel compliance with the Subpoenas issued, it is the Commissions lawful authority
9 that must be enforced in these proceedings.

10 On or about July 16, 2012 Complainant presented to the Commission Executive Director,
11 Earnest G. Johnson his Applications for two (2) Administrative Subpoena Ducas Tecum to be issued to
12 Jim Pearson, and Pearson Water Co./Pearson Transport Co. to produce copy of certain requested
13 documents, records, logs and papers and to appear at the hearing scheduled for August 7, 2012 at 10:00
14 a.m.

15 On July 19, 2012 Executive Director, Johnson signed and certified the Subpoenas and mailed
16 them back to the Complainant. Jim Pearson and Pearson Water Co. were served with the Subpoenas by
17 Debi Woskobojnik on July 25, 2012. Mr. Pearson knowingly and intentionally, absolutely refused to
18 comply as it clearly became evident at the August 7, 2012 hearing.

19 On Thursday, July 26, 2012 Complainant Alan Smith and witness Richard M. Burt traveled to
20 Williams, Arizona to interview Mr. James Pearson, (the interview was recorded with a digital audio
21 recorder and later transcribed and presented in evidence and is part of the record of the Docket). Mr.
22 Pearson was extremely hostile toward the Complainant and his witness and informed him/them that he
23 would absolutely not comply with the Subpoenas or attend the hearing scheduled for August 7, 2012.

24 On August 7, 2012 Mr. Hardcastle, David Allred, Brooke Utilities, Inc. and Payson Water Co.
25 were legally served with a Subpoena by J. Stephen Gehring on behalf of Alan Smith after the hearing
26 and notice of that service of process was mailed on August 7, 2012.

27 On or about August 20, 2012 Mr. Hardcastle filed (not so timely, 10 day requirement)
28 Respondent’s Response to the Subpoena served upon them on August 7, 2012. In that response he
29 arrogantly and defiantly refused to comply with the Subpoena without just cause or excuse in furtherance
30 of his on going and continuing concealment of vital and necessary documents and records that if

1 disclosed would further evidence the criminal activities alleged in both this proceeding and in Docket
2 No. W-03514A-12-0008. Some of the documents requested later showed up in PWC's Application for a
3 Water Augmentation Tariff to haul water to E. Verde Park. (See: Exhibits submitted in that application)

4 On or about August 13, 2012 Complainant mailed to Executive Director Ernest G. Johnson his
5 Second Subpoena to be issued to Robert T. Hardcastle, David Allred, Brooke Utilities, Inc. and Payson
6 Water Co. which was served upon the Respondents on August 27, 2012 by David R. Vaughn of the
7 Payson Constables Office. Notice of service of process was delayed and not mailed until September 10,
8 2012.

9 On September 6, 2012 Respondent Hardcastle filed his Motion to Quash the Subpoena received
10 by him, David Allred and the Respondents on August 27, 2012.

11 On September 11, 2012 Complainant mailed his Response and Objection to Respondent's
12 Motion to Quash the Subpoena.

13 On September 17, 2012 the ALJ filed his Procedural Order that scheduled a procedural
14 conference for September 28, 2012 at 10:00 a. m. at the ACC Hearing Rm. No. 1.

15 On September 20, 2012 Complainant mailed his Motion to Initiate an Action in the Superior
16 court to Compel Jim Pearson, Pearson Transport, Brookes Utilities, Inc., Payson Water Co., Inc., Robert
17 T. Hardcastle, David Allred and Martin Zabola to Comply with the Subpoenas previously served upon
18 them.

19 On September 28, 2012 a Procedural Conference Hearing was conducted with Complaints'
20 counsel at that time not appearing on behalf of the Complainant.

21 On December 31, 2012 Respondents mailed their Motion to Dismiss.

22 On January 9, 2013 Complainant's counsel mailed his Response to the Motion to Dismiss.

23 In the previous proceeding, Docket No. W-03514A-12-0008 Mr. Pearson, Mr. Hardcastle and
24 the Respondents were subpoenaed to produce a number of documents and records. Pearson absolutely
25 refused to comply with the Subpoenas served upon him. Rather than comply Mr. Zabola ran off to N.
26 Dakota. Mr. Hardcastle only partially complied and now in these proceedings absolutely refuses to
27 comply.

28
29 **Arizona Administrative Code, Arizona Corporation Commission Rules of Practice and**
30 **Procedure Rule R14-3-109 (O) Subpoenas, in part specifically states:**
31

1 "Subpoenas requiring the attendance of a witness from any place in the state of Arizona to
2 any designated place of hearing for the purpose of taking testimony of such witnesses orally before
3 the Commission may be issued upon application in writing. A subpoena may also command the
4 person to whom it is directed to produce books, papers, documents or tangible things designated
5 therein. The application for such subpoenas must specify, as clearly as possible, the books, waybills,
6 papers, accounts or other documents desired."
7

8 Of real interest is that Complainant's Motion Pro Se to Compel Pearson to appear and to provide
9 documents and records was discussed in detail at the August 7, 2012 hearing. Some of these same
10 opinions again surfaced at the September 28, 2012 Procedural Conference and affected the other
11 Subpoenas at issues as well. In review of the ACC audio/visual recordings at that hearing legal opinions
12 were brought forth by Legal Staff Member Robin Mitchell that disclosed the following:

13 **Opinion by ACC Staff Legal, Robin Mitchell:**
14

15 "The Commission does have authority to enforce a Subpoena (17:00) by Statute and Rule."
16

17 "The Commission would have the authority to enforce or compel the witness to attend under a
18 Subpoena issued by the Commission."
19

20 **Administrative Procedure, Article 6 Adjudicative Proceedings ARS § 41-1062 A (4) in part**
21 **specifically states:**
22

23 "The officer presiding at the hearing may cause to be issued subpoenas for the attendance of
24 witnesses and for the production of books, records, documents and other evidence and shall have the
25 power to administer oaths. Unless otherwise provided by law or agency rule, subpoenas so issued shall
26 be served and, upon application to the court by a party or the agency, enforced in the manner
27 provided by law for the service and enforcement of subpoenas in a civil action. . . . All provisions of
28 law compelling a person under subpoena to testify are applicable. . . . Notwithstanding the provisions of
29 Section 12-2212, no subpoenas, depositions or other discovery shall be permitted in contested cases
30 except as provided by agency rule or this paragraph."
31

32 **Courts and Civil Procedure, Article 2. Duties and privileges of Witnesses ARS § 12-2212 A, B**
33 **Subpoena by public officer; contempt specifically states:**
34

- 35 A. When a public officer is authorized by law to take evidence, he may issue subpoenas, compel
36 attendance of witnesses and production of documentary evidence, administer oaths to witnesses,
37 and cause depositions to be taken, in like manner as in civil actions in the superior court.
38
- 39 B. If a witness fails to appear at the time and place designated in the subpoena, or fails to answer
40 questions relating to the matter about which the officer is authorized to take testimony, or fails to
41 produce a document, the officer may, by affidavit setting forth the facts, apply to the superior
42 court of the county where the hearing is held, and the court shall thereupon proceed as
43 though such failure had occurred in an action pending before it.
44

1
2 It should further be noted that Mr. Pearson never objected to the Subpoenas issued to him. The
3 Supreme Court tells us in **Donovan v. Lone Steer, Inc., 464 U. S. 408, 415 (1984)** and **Craib v.**
4 **Bulmash, 777 P.2d 1120, 1125 (Cal. 1989)**, the cases provide protection for a person subpoenaed by an
5 agency by allowing that person to raise objections to the subpoena in court before suffering any penalties
6 for refusing to comply with it." Of course, after judicial enforcement, the failure to obey the court's
7 enforcement order is punishable as a contempt of court.

8 "The very purpose of the administrative subpoena is to discover and procure evidence, not to prove
9 a pending case, but to make a case if, in the agency's judgment, the facts thus discovered should justify
10 doing so." **EEOC v. Bay Shipbuilding Corp., 668 F.2d 304,312 (7th Cir. 1981).**

11
12 The Respondents, Mr. Haradcastle, Dave Allred and Mr. Pearson in both proceedings have exploited
13 the inabilities of the Commission, Legal Staff and the ALJ to perform according to their distinctive
14 Constitutional and Statutory authority to enforce the Subpoenas to the point where they can deny the
15 Complainant the vital and necessary documents, records, logs and witness testimony he seeks and thumb
16 their defiant noses at the Commission in contempt and get away it.

17 "Agency subpoena power is not confined to those over whom it may exercise regulatory jurisdiction,
18 but extends to any persons from whom it can obtain information relevant and material to its
19 legitimate inquiry." **FCC v. Cohn, 154 F. Supp. 899, 906 (S.D.N.Y. 1957).**

20
21 "For an agency to exercise subpoena power, it need not show that it has regulatory jurisdiction over
22 the person subpoenaed." **Freeman v. Fidelity-Philadelphia Trust Co., 248 F. Supp. 487 492 (E.D.**
23 **Pa. 1965).**

24
25 "Testimony and records pertinent to a legitimate investigation may be subpoenaed even though the
26 subpoena is directed to a third person who is not subject to the agency's jurisdiction and who is not
27 the subject of the investigation." **United States v. Marshall Durbin & Co., 363 F.2d 1 (5th Cir.**
28 **1966); Freeman v. Brown Bros. Harriman & Co., 357 F.2d 741 (2d Cir. 1966).**

29
30 "All that is necessary is that the records be relevant to an investigation that is within the agency's
31 authority." **Redding Pine Mills v. State Bd., 320 P.2d 25 (Cal. App. 1958) State v. Mees, 49**
32 **N.W.2d 386 (Minn. 1951).**

33
34
35 How then can the Complainant in the current proceedings expect to be fully prepared for a hearing
36 on the issues before the Commission or allowed due process of law since due process and the proper

1 administration of law was absolutely denied the Complainants in the prior proceedings in 12-0008 and
2 where apparently this Complainant is may be denied by some colorable Telephonic Testimony?

3 In **Goldberg v. Kelly 397 U. S. 254, 267-271 (1970)** the Court stressed that, where agency
4 “decisions turn on questions of fact, due process requires an opportunity to confront and cross-
5 examine adverse witnesses. The right to cross-examine exists in all types of cases where
6 administrative and regulatory actions are under scrutiny **Green v. McElroy, 360 U. S. 474, 497**
7 **(1959) and Hall v. State Racing Commn., 505 So. 2d 744 (La. App. 1987).**
8
9

10 The documentation, records, logs, invoices and witness Subpoenaed by the Complainant in these
11 proceedings are extremely relevant, material and directly related to all of the issues and allegations raised
12 in the Complaint and particularly relevant to the Water Augmentation Period of 2011, application of the
13 Curtailment Plan, wrongful termination of service, over charging of reconnection fees, misapplication of
14 reconnection fees, Customer Service non-compliance and Consumer Fraud, as Pearson Water
15 Co./Pearson Transport Co. contracted with Payson Water Co., and/or Brooke Utilities, Inc., to haul water
16 to the Mesa del Caballo and East Verde Park. The documents requested in both the previous proceedings
17 and presently have never been or only partially produced and have been and are required to be produced
18 and witnesses are required to appear for examination.

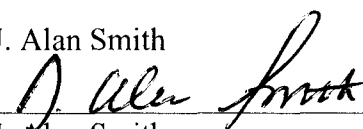
19 Payson water Co. Inc., Brooke Utilities, Inc., Mr. Hardcastle, Mr. Allred, Mr. Zabola and Mr.
20 Pearson “may not claim privilege for corporate records, in every such case the records kept are not
21 within the protection of the self-incrimination privilege.” **Shapiro v. United States, 335 U. S. 1, 58**
22 **(1948)** “required records are also not protected by the 5th Amendment privilege against self-
23 incrimination **Craib v. Bulmash, 777, P.2d 1120 (Cal. 1989)** “records required by law to be kept in
24 order that there may be suitable information of transactions which are the appropriate subjects of
25 governmental regulation and the enforcement of restriction validly established” **Shapiro v. United**
26 **States, 335 U. S. 1, 58 (1948) Id at 33.**
27

28 **WHEREFORE**, the Complainant, request that the Commission and its honorable Administrative
29 Law Judge to make Mr. Pearson comply with the Subpoena issued by the Commission to him, to appear
30 before the administrative law court, to produce then and there the documents requested and to fully and
31 completely comply without any further delay, frivolous argument, arbitrary denial of the possession of
32 the documents requested or to show cause why they should not comply, not appear, not produce the

documents requested particularly related to transactions of business between the witness and his business
and the Payson Water Co. / Brooke Utilities Inc.

Respectfully submitted this 18th day of September, 2014

J. Alan Smith


J. Alan Smith

CERTIFICATE OF SERVICE

The Original and 13 copies of the foregoing Motion have been mailed this 18th day September, 2014 to the following:

DOCKET CONTROL
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

Copies of the foregoing Motion have been mailed this 18th day September, 2014 to the following:

Robin R. Mitchell
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By: 